



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 13, 2015

Ms. Hadassah Schloss
Director of Open Government
Texas General Land Office
P.O. Box 12873
Austin, Texas 78711-2873

OR2015-16712

Dear Ms. Schloss:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 575291.

The Texas General Land Office (the "GLO") received a request for the current contract for pharmacy services for the Texas State Veterans Homes, including any amendments, addendums, extensions, and pricing. Although the GLO takes no position as to whether the submitted information is excepted under the Act, you state release of the submitted information may implicate the proprietary interests of PharMerica Corporation ("PharMerica").¹ Accordingly, you state, and provide documentation showing, you notified PharMerica of the request and of its right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received comments from PharMerica. We have considered the submitted arguments and reviewed the submitted information.

PharMerica raises section 552.104 of the Government Code for portions of the submitted information. Section 552.104 excepts from disclosure "information that, if released, would

¹We note the GLO did not comply with section 552.301 of the Government Code in requesting a ruling from this office. *See* Gov't Code § 552.301(b), (e). Nonetheless, because third-party interests can provide compelling reasons to overcome the presumption of openness, we will consider the submitted arguments against disclosure of the submitted information. *See id.* §§ 552.007, .302, .352.

give advantage to a competitor or bidder.” Gov’t Code § 552.104. A private third party may invoke this exception. *Boeing Co. v. Paxton*, No. 12-1007, 2015 WL 3854264 (Tex. June 19, 2015). The “test under section 552.104 is whether knowing another bidder’s [or competitor’s information] would be an advantage, not whether it would be a decisive advantage.” *Id.* at *9. We understand the GLO previously awarded a contract to PharMerica for pharmacy services. PharMerica states the GLO issued a new request for proposals for pharmacy services and the requestor is a direct competitor for the bid. PharMerica explains releasing the information at issue would inform the requestor of the precise differences between PharMerica’s and the requestor’s bids and allow the requestor to tailor its next bid, in addition to future bids, to undercut PharMerica line by line. PharMerica asserts, in the highly competitive and highly concentrated pharmacy services industry, release of the information at issue would not only harm PharMerica, but other competitors who do not have access to the information at issue as well. After review of the information at issue and consideration of PharMerica’s arguments, we find PharMerica has established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the GLO may withhold the information we have marked under section 552.104(a) of the Government Code.² *See* Open Records Decision No. 170 at 2 (1977) (release of bids while negotiation of proposed contract is in progress would necessarily result in an advantage to certain bidders at expense of others and could be detrimental to public interest in contract under negotiation); *see also* Open Records Decision No. 541 (1990) (recognizing limited situation in which statutory predecessor to section 552.104 continued to protect information submitted by successful bidder when disclosure would allow competitors to accurately estimate and undercut future bids); *see also* Open Records Decision No. 309 (1983) (suggesting that such principle will apply when governmental body solicits bids for same or similar goods or services on recurring basis).

Section 552.136 of the Government Code provides, “[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136(b); *see id.* § 552.136(a) (defining “access device”). This office has determined insurance policy numbers are access device numbers for purposes of section 552.136. *See* Open Records Decision No. 684 at 9 (2009). Upon review, the GLO must withhold the insurance policy number we have marked under section 552.136 of the Government Code.

In summary, the GLO may withhold the information we have marked under section 552.104(a) of the Government Code. The GLO must withhold the insurance policy number we have marked under section 552.136 of the Government Code. As no other exceptions have been raised for the remaining information, it must be released.

² As our ruling is dispositive, we need not address PharMerica’s remaining arguments against disclosure.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Cole Hutchison
Assistant Attorney General
Open Records Division

CH/dls

Ref: ID# 575291

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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(w/o enclosures)